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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 TRACY WILSON,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE,
15 Commissioner of Social Security,

16 Defendant.
17

)
) Case No. CV 10-03217-JEM
)

) MEMORANDUM OPINION AND ORDER
) REVERSING DECISION OF THE
) COMMISSIONER OF SOCIAL SECURITY
) AND REMANDING FOR FURTHER
) PROCEEDINGS
)
)
)

18 PROCEEDINGS

19 On May 3, 2010, Tracy M. Wilson ("Plaintiff" or "Claimant" or "Wilson") filed a
20 complaint seeking review of the decision of the Commissioner of Social Security
21 ("Commissioner") denying Plaintiff's applications for Social Security Disability Insurance
22 ("SSDI") benefits and Supplemental Security Income ("SSI") benefits. The Commissioner
23 filed an Answer on January 3, 2011. On April 6, 2011, the parties filed a Joint Stipulation
24 ("JS"). The matter is now ready for decision.

25 Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before this
26 Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record
27 ("AR"), the Court concludes that the Commissioner's decision should be reversed and
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1 remanded for further proceedings in accordance with law and this Memorandum Opinion and
2 Order.

3 **BACKGROUND**

4 Plaintiff is a 36 year old female who alleged bilateral carpal tunnel syndrome,
5 tendonitis in arms and back, bilateral hip injuries, pain in back, shoulders, neck and arms,
6 dyslexia, and cardiac complications. (AR 124-25.) Plaintiff alleged disability beginning April
7 29, 2007. (AR 10.)

8 Plaintiff's claims were denied initially on December 19, 2007, and on reconsideration
9 on April 29, 2008. (AR 10.) She filed a timely request for hearing, which was held before
10 Administrative Law Judge ("ALJ") Mary Everstine on September 8, 2009, in Santa Barbara,
11 California. (AR 10.) Claimant and her husband, Jose Uribe, appeared and testified. (AR
12 10.) Vocational expert ("VE") Elizabeth Cerezo-Donnelly also testified. (AR 10.) Claimant
13 was represented by counsel. (AR 10.)

14 The ALJ issued an unfavorable decision on October 29, 2009. (AR 10-18.) The
15 Appeals Council denied review on May 3, 2010. (AR 1-3.)

16 **DISPUTED ISSUES**

17 As reflected in the Joint Stipulation, Plaintiff raises the following disputed issues as
18 grounds for reversal and remand:

- 19 1. Whether the ALJ properly rejected the testimony of Plaintiff's husband.
- 20 2. Whether the ALJ properly rejected the opinion of Dr. Diaz, Plaintiff's treating
21 physician.
- 22 3. Whether the ALJ's mental residual functional capacity assessment finding
23 properly incorporates the evidence of record and the ALJ's own findings.
- 24 4. Whether the ALJ properly evaluated Plaintiff's subjective complaints.
- 25 5. Whether the ALJ properly determined that there were other jobs Plaintiff could
26 perform.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and based on the proper legal standards).

Substantial evidence means “‘more than a mere scintilla’ . . . but less than a preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401 (internal quotations and citation omitted).

This Court must review the record as a whole and consider adverse as well as supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). Where evidence is susceptible to more than one rational interpretation, the ALJ's decision must be upheld. Morgan v. Comm'r, 169 F.3d 595, 599 (9th Cir. 1999). “However, a reviewing court must consider the entire record as a whole and may not affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

SEQUENTIAL EVALUATION

The Social Security Act defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or . . . can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Commissioner has established a five-step sequential process to determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920.

The first step is to determine whether the claimant is presently engaging in substantial gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is

1 engaging in substantial gainful activity, disability benefits will be denied. *Bowen v. Yuckert*,
2 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a
3 severe impairment or combination of impairments. *Parra*, 481 F.3d at 746. An impairment is
4 not severe if it does not significantly limit the claimant's ability to work. *Smolen v. Chater*, 80
5 F.3d 1273, 1290 (9th Cir. 1996). Third, the ALJ must determine whether the impairment is
6 listed, or equivalent to an impairment listed, in 20 C.F.R. Pt. 404, Subpt. P, Appendix I of the
7 regulations. *Parra*, 481 F.3d at 746. If the impediment meets or equals one of the listed
8 impairments, the claimant is presumptively disabled. *Bowen v. Yuckert*, 482 U.S. at 141.
9 Fourth, the ALJ must determine whether the impairment prevents the claimant from doing
10 past relevant work. *Pinto v. Massanari*, 249 F.3d 840, 844-45 (9th Cir. 2001). Before
11 making the step four determination, the ALJ first must determine the claimant's residual
12 functional capacity ("RFC").¹ 20 C.F.R. § 416.920(e). The RFC must consider all of the
13 claimant's impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
14 416.945(a)(2); Social Security Ruling ("SSR") 96-8p. If the claimant cannot perform his or
15 her past relevant work or has no past relevant work, the ALJ proceeds to the fifth step and
16 must determine whether the impairment prevents the claimant from performing any other
17 substantial gainful activity. *Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir. 2000).

18 The claimant bears the burden of proving steps one through four, consistent with the
19 general rule that at all times the burden is on the claimant to establish his or her entitlement
20 to benefits. *Parra*, 481 F.3d at 746. Once this prima facie case is established by the
21 claimant, the burden shifts to the Commissioner to show that the claimant may perform
22 other gainful activity. *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). To
23 support a finding that a claimant is not disabled at step five, the Commissioner must provide
24 evidence demonstrating that other work exists in significant numbers in the national economy
25 that the claimant can do, given his or her RFC, age, education, and work experience. 20

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27 ¹ Residual functional capacity ("RFC") is what one "can still do despite [his or her]
28 limitations" and represents an assessment "based on all the relevant evidence." 20 C.F.R.
§§ 404.1545(a)(1), 416.945(a)(1).

1 C.F.R. § 416.912(g). If the Commissioner cannot meet this burden, then the claimant is
2 disabled and entitled to benefits. Id.

3 **THE ALJ DECISION**

4 In this case, the ALJ determined at step one of the sequential process that Plaintiff
5 has not engaged in substantial gainful activity since April 29, 2007, the alleged onset date.
6 (AR 12.)

7 At step two, the ALJ determined that Plaintiff has the following combination of
8 medically determinable severe impairments: major depressive disorder, panic disorder,
9 myofascial neck strain, fibromyalgia, and a history of myocarditis. (AR 12.)

10 At step three, the ALJ found that Claimant does not have an impairment or
11 combination of impairments that meet or medically equal a listed impairment. (AR 12.)

12 The ALJ then determined that Wilson has the residual functional capacity to perform
13 light work except for limitations to occasional above shoulder reaching and simple repetitive
14 tasks. (AR 13.) In determining Plaintiff's RFC, the ALJ made an adverse credibility finding.
15 (AR 15.)

16 Based on Plaintiff's RFC, the ALJ found that Wilson is unable to perform her past
17 relevant work as a hand packager, clerk, or fast food worker. (AR 16-17.)

18 Nonetheless, at step five, the ALJ determined with the aid of VE testimony that there
19 are jobs in the national economy in significant numbers that Plaintiff can perform. (AR 17-
20 18.) These jobs include collator and table worker, both unskilled. (AR 17.)

21 Hence, the ALJ concluded that Plaintiff was not disabled within the meaning of the
22 Social Security Act. (AR 18.)

23 **DISCUSSION**

24 The ALJ decision is legally flawed in several respects and must be reversed.
25 Fundamentally, the ALJ decision fails to offer sufficient analysis of Plaintiff's soft tissue pain
26 conditions of fibromyalgia and myofascial strain, or to develop the record properly on those
27 conditions. The ALJ improperly discounted Plaintiff's credibility. The ALJ improperly rejected
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1 the opinion of Plaintiff's treating physician as to Plaintiff's fibromyalgia symptoms. The ALJ
2 improperly failed to consider the lay witness testimony of Plaintiff's husband. The ALJ failed
3 to consider the combined effect of Plaintiff's multiple medical conditions and multiple
4 medications on her ability to work. These errors undermine the ALJ's RFC and step five
5 determination that Plaintiff can perform other jobs in the national economy.

6 **I. PLAINTIFF'S FIBROMYALGIA**

7 Plaintiff was hospitalized in April 2007 for chest pain due to postpartum myocarditis.
8 (AR 14.) Subsequently, she was diagnosed with carpal tunnel syndrome, major depressive
9 disorder, panic disorder, and back pain. (AR 14.) Dr. Julio Diaz was Plaintiff's primary
10 treating physician from 2007 through 2009. (AR 179.) Dr. Diaz filed a letter, dated August
11 26, 2009, that set forth his diagnoses of fibromyalgia, carpal tunnel syndrome, severe
12 depression, anxiety, post-traumatic stress disorder, and attention deficit disorder. (AR 179-
13 80.) He stated that Plaintiff suffers from chronic neck, shoulder and back pain, and chronic
14 fatigue from fibromyalgia. (AR 179.) A consulting examiner, Dr. Hsien Young, also found
15 that Claimant had multiple trigger points on soft tissue palpation coinciding somewhat to
16 fibromyalgia trigger points in the posterior trunk and extremities, but "the full fibromyalgia
17 examination was not done." (AR 246.) Plaintiff takes the following medications for her
18 fibromyalgia and other medical conditions: Clonazepam, Cymbalta, Depakote, Wellbutrin,
19 Gabapursin, Temazepam, Spironolactone, Opana, Oxymorphone, Vicodin, Prozac,
20 Neurontin, Percocet, Opana, Lorazepam, Ambien, and Klonopin. (AR 43, 130, 160, 235-
21 239, 245, 255, 258, 309-10, 350-51.) These medications help somewhat but do not reduce
22 the pain enough to keep it from severely reducing her activities. (AR 179.) Plaintiff's
23 husband testified that he had to stop working to care for his wife and children because
24 Plaintiff's medications interfere with her ability to care for the children and "she spends most
25 of the day in bed with one good day a week." (AR 16.) He testified at hearing that her
26 condition had gotten worse. (AR 52.)

1 Plaintiff's primary alleged disability is pain from fibromyalgia. Fibromyalgia is "a
2 rheumatic disease that causes inflammation of the fibrous connective tissue components of
3 muscles, tendons ligaments, and other tissue." Benecke v. Barnhart, 379 F.3d 587, 589 (9th
4 Cir. 2004). In Benecke, the Ninth Circuit determined that fibromyalgia can be disabling. It
5 described fibromyalgia as follows:

6 Benecke suffers from fibromyalgia, previously called fibrositis, a
7 rheumatic disease that causes inflammation of the fibrous connective
8 tissue components of muscles, tendons, ligaments, and other tissue.
9 See, e.g., *Lang v. Long-Term Disability Plan of Sponsor Applied Remote*
10 *Tech, Inc.*, 125 F.3d 794, 796 (9th Cir. 1997); *Brosnahan v. Barnhart*, 336
11 F.3d 671, 672 n. 1 (8th Cir. 2003). Common symptoms, all of which
12 Benecke experiences, include chronic pain throughout the body, multiple
13 tender points, fatigue, stiffness, and a pattern of sleep disturbance that
14 can exacerbate the cycle of pain and fatigue associated with this disease.
15 See *Brosnahan*, 336 F.3d at 672 n. 1; *Cline v. Sullivan*, 939 F.2d 560, 563
16 (8th Cir. 1991). Fibromyalgia's cause is unknown, there is no cure, and it
17 is poorly understood within much of the medical community. The disease
18 is diagnosed entirely on the basis of patients' reports of pain and other
19 symptoms. The American College of Rheumatology issued a set of
20 agreed-upon diagnostic criteria in 1990, but to date there are no
21 laboratory tests to confirm the diagnosis. See *Jordan v. Northrop*
22 *Grumman Corp.*, 370 F.3d 869, 872 (9th Cir. 2004); *Brosnahan*, 336 F.3d
23 at 672 n. 1.

24 Id. at 589-90; see also Harman v. Apfel, 211 F.3d 1172 (9th Cir. 2000) (reversing ALJ
25 decision denying benefits for fibromyalgia); Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991)
26 (upholding benefits for fibrositis, now known as fibromyalgia).

1 Jordan v. Northrop Grumman Corp., 370 F.3d 869, 877 (9th Cir. 2003), a case in
2 which benefits were denied for fibromyalgia, recognized that the accepted diagnostic test is
3 that Plaintiff must have pain in 11 of 18 tender points. See also Rollins v. Massanari, 261
4 F.3d 853, 855 (9th Cir. 2001) (11 of 18 tender points). Objective tests such as myelograms
5 are administered to rule out other diseases and alternative explanations for the pain but do
6 not establish the presence or absence of fibromyalgia. Jordan, 370 F.3d at 873, 877. It
7 cannot be objectively proved. Id. at 877. The symptoms can be worse at some times than
8 others. Id. at 873. The Ninth Circuit recognizes fibromyalgia as a physical rather than a
9 mental disease. Id. Myofascial pain syndrome is also a muscle pain, soft tissue condition.
10 The Merck Manual 481 (17th ed. 1999).

11 **II. THE ALJ FAILED TO DEVELOP THE RECORD PROPERLY**

12 The ALJ failed to develop the record properly in this case by not retaining a
13 rheumatologist to ascertain more definitively the nature and severity of Plaintiff's fibromyalgia
14 and myofascial strain conditions. In Social Security cases, the ALJ has a special,
15 independent duty to develop the record fully and fairly and to assure that the claimant's
16 interests are considered. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir. 2001);
17 Smolen, 80 F.3d 1273, 1288 (9th Cir. 1996); Brown v. Heckler, 713 F.2d 441, 443 (9th Cir.
18 1983). The ALJ has a basic duty to inform himself about facts relevant to his decision.
19 Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan, Jr., concurring). The ALJ's
20 duty to develop the record fully exists even when the claimant is represented by counsel and
21 is "heightened" when the claimant may be mentally ill and unable to protect his or her
22 interests. Tonapetyan, 242 F.3d at 1150. Ambiguous evidence or the ALJ's own finding that
23 the record is inadequate to allow for proper evaluation of the evidence triggers the ALJ's duty
24 to "conduct an appropriate inquiry." Id. The ALJ may discharge this duty by subpoenaing
25 the claimant's physicians, submitting questions to them, continuing the hearing or keeping
26 the record open after the hearing to allow supplementation of the record. Id.; Smolen, 80
27 F.3d at 1288.

1 The ALJ relied on the opinions of state reviewing physician and Dr. Young to reject
2 the opinion of Dr. Diaz regarding the severity of Plaintiff's fibromyalgia. (AR 16.) As non-
3 examining physicians, the state doctors' opinions are not substantial evidence that justifies
4 rejection of a treating physician opinion unless consistent with and supported by other
5 independent evidence in the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at 600.
6 Dr. Young found evidence of fibromyalgia but the full fibromyalgia examination was not done.
7 (AR 246.) Nor did Dr. Young have a myelogram done to exclude other causes of Plaintiff's
8 pain.

9 Dr. Young opined that Plaintiff could do medium work but he saw Plaintiff only once in
10 2007. By contrast, Dr. Diaz saw Plaintiff on numerous occasions from 2007 to 2009.
11 Plaintiff says that Dr. Diaz reported the presence of tender points (JS 19), but the Court finds
12 no reference to tender points in his treatment notes. Nor was a myelogram done to exclude
13 other causes. Plaintiff describes Dr. Diaz as a family practitioner with training in mood
14 affective disorders and other mental health problems. He is not a rheumatologist;
15 nonetheless, he reports fibromyalgia symptoms – symptoms Dr. Young also diagnosed as
16 fibromyalgia. Additionally, Plaintiff's husband testified that he had to quit work because
17 Plaintiff was no longer able to take care of their children and spends most of her day in bed.
18 (AR 16.) He testified at hearing that she had gotten worse. (AR 52.)

19 Dr. Young's single assessment of Plaintiff's condition in 2007 is insufficient to offset
20 two years of observations by Dr. Diaz through 2009 and the fact that Plaintiff's husband had
21 to quit his job because Plaintiff could no longer care for their children. This is particularly true
22 because Dr. Young diagnosed possible fibromyalgia but never tested for it. There was
23 enough evidence of fibromyalgia that the ALJ should have developed the record more fully.
24 The record here is simply too ambiguous, incomplete, and insufficient to assess the nature
25 and severity of Plaintiff's fibromyalgia/myofascial strain. The ALJ should have ordered a
26 consulting examination by a rheumatologist, which is the proper specialty for evaluating
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1 Plaintiff's fibromyalgia. Benecke, 379 F.3d at 594 n.4 ("[r]heumatology is the relevant
2 speciality for fibromyalgia").

3 **III. THE ALJ'S ADVERSE CREDIBILITY FINDING IS NOT** 4 **SUPPORTED BY CLEAR AND CONVINCING REASONS**

5 Plaintiff challenges the ALJ's adverse credibility finding regarding Plaintiff's subjective
6 pain allegations. (AR 15-16.) The test for deciding whether to accept a claimant's subjective
7 symptom testimony turns on whether the claimant produces medical evidence of an
8 impairment that reasonably could be expected to produce the pain or other symptoms
9 alleged. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also Reddick v. Chater,
10 157 F.3d 715, 722 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1281-82 esp. n.2 (9th
11 Cir. 1996). The Commissioner may not discredit a claimant's testimony on the severity of
12 symptoms merely because they are unsupported by objective medical evidence. Reddick,
13 157 F.3d at 722; Bunnell, 947 F.2d at 343, 345. If the ALJ finds the claimant's pain
14 testimony not credible, the ALJ "must specifically make findings which support this
15 conclusion." Bunnell, 947 F.2d at 345. The ALJ must set forth "findings sufficiently specific
16 to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony."
17 Thomas v. Barnhart, 278 F.3d 949, 958 (9th Cir. 2002); see also Rollins v. Massanari, 261
18 F.3d 853, 856-57 (9th Cir. 2001); Bunnell, 947 F.2d at 345-46. Unless there is evidence of
19 malingering, the ALJ can reject the claimant's testimony about the severity of a claimant's
20 symptoms only by offering "specific, clear and convincing reasons for doing so." Smolen, 80
21 F.3d at 1283-84; see also Reddick, 157 F.3d at 722. The ALJ must identify what testimony
22 is not credible and what evidence discredits the testimony. Reddick, 157 F.3d at 722;
23 Smolen, 80 F.3d at 1284.

24 In this case, the ALJ concluded that Plaintiff's medically determinable impairments
25 reasonably could be expected to produce the alleged pain but the symptoms are not credible
26 to the extent they are inconsistent with her RFC. (AR 15.) There was no assertion that
27 Plaintiff was malingering. Thus, the ALJ was required to offer specific, clear and convincing
28 reasons for discounting Plaintiff's subjective pain symptoms. The ALJ did not do so as to
Plaintiff's fibromyalgia/myofascial strain conditions.

1 The Court already has ruled that the medical evidence as to Plaintiff's fibromyalgia is
2 ambiguous and not sufficient to assess its severity. Additionally, the ALJ's discrediting of
3 Plaintiff's credibility because "treating physicians responded with limited and conservative
4 care" (AR 16) is inconsistent with the current state of medical knowledge about fibromyalgia.
5 The condition has no cure and Dr. Diaz was prescribing numerous medications. (AR 179.)
6 The Commissioner argues that Dr. Diaz did not refer Plaintiff to a pain management program
7 for nerve blocks, trigger point injections and other aggressive treatment (JS 15) but cites no
8 medical evidence that such referrals are the standard method of treating fibromyalgia. An
9 ALJ may not make his own medical assessments. Banks v. Barnhart, 434 F. Supp. 2d 800,
10 805 (C.D. Cal. 2006) (the ALJ must not succumb to the temptation to play doctor and make
11 [his] own independent medical findings), citing Rohan v. Chater, 98 F.3d 966, 970 (7th Cir.
12 1996). Again, there is no cure for fibromyalgia. Benecke, 379 F.3d at 589-90. There is no
13 evidence in the record from any physician that anything more could have been done that
14 would have alleviated Plaintiff's symptoms. Limited and conservative care is not a clear and
15 convincing reason for discounting Plaintiff's subjective symptoms as to her fibromyalgia.

16 The only other reason offered for discrediting Plaintiff's credibility was that "she was
17 able to play with her young children, an activity inconsistent with the complete inability to
18 function indicated by Dr. Diaz." (AR 16.) The ALJ's assertion is not supported by substantial
19 evidence. Dr. Diaz did not say that Plaintiff was completely unable to function. He said that
20 pain and fatigue limit her "to no more than 45 minutes to an hour at a time, and no more than
21 3 or 4 hours cumulatively." (AR 179.) His letter says she is "severely" or "markedly" limited
22 in her ability to function (AR 179), not that she was completely unable to function.

23 There was considerable evidence from Plaintiff and her husband that she no longer
24 can take care of her children. (AR 16, 43-45, 50, 52.) Plaintiff has stated repeatedly she can
25 no longer care for her children and spends most of the day in bed. (AR 43-45, 146.) Her
26 husband had to quit his job to take care of the children. (AR 16.) The ALJ cites to but one
27 unexplained comment made to Dr. Wendel, a psychologist consulting examiner, that, "She
28 plays with the children." (AR 258.) This statement could have referred to board games or

1 activities of limited physical exertion, and the nature of fibromyalgia is that there are good
2 days and bad days. There is no indication how long she was able to play with her children or
3 what impact it had on her. There is too much evidence of Plaintiff's inability to care for her
4 children to discredit her credibility over one ambiguous comment.

5 The ALJ's adverse credibility determination is not supported by clear and convincing
6 reasons as to Plaintiff's fibromyalgia.

7 **IV. THE ALJ IMPROPERLY REJECTED THE TREATING PHYSICIAN'S OPINION**

8 Plaintiff next challenges the ALJ's rejection of the opinion of Plaintiff's treating
9 physician, Dr. Julio Diaz. Dr. Diaz treated Plaintiff from 2007 to 2009. He filed a two page
10 letter summarizing his diagnoses and setting forth numerous functional limitations. (AR 179-
11 80.) He submitted over 30 pages of treatment notes. (AR 235-42, 304-10, 340-52.) The
12 ALJ rejected Dr. Diaz's opinion rather summarily because objective examination findings
13 were insufficient to support his opinion, Plaintiff's subject medical history "appears to be the
14 basis for his conclusions," objective neurological examination findings support the RFC, and
15 Plaintiff was able to play with her children. (AR 16.) The ALJ's reasons are not supported by
16 substantial evidence.

17 In evaluating medical opinions, the case law and regulations distinguish among the
18 opinions of three types of physicians: (1) those who treat the claimant (treating physicians);
19 (2) those who examine but do not treat the claimant (examining physicians); and (3) those
20 who neither examine nor treat the claimant (non-examining, or consulting, physicians). See
21 20 C.F.R. §§ 404.1527, 416.927; see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995).
22 In general, an ALJ must accord special weight to a treating physician's opinion because a
23 treating physician "is employed to cure and has a greater opportunity to know and observe
24 the patient as an individual." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)
25 (citation omitted). If a treating source's opinion on the issues of the nature and severity of a
26 claimant's impairments is well-supported by medically acceptable clinical and laboratory
27 diagnostic techniques, and is not inconsistent with other substantial evidence in the case
28 record, the ALJ must give it "controlling weight." 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

1 Where a treating doctor's opinion is not contradicted by another doctor, it may be
2 rejected only for "clear and convincing" reasons. Lester, 81 F.3d at 830. However, if the
3 treating physician's opinion is contradicted by another doctor, such as an examining
4 physician, the ALJ may reject the treating physician's opinion by providing specific, legitimate
5 reasons, supported by substantial evidence in the record. Lester, 81 F.3d at 830-31; see
6 also Orn, 495 F.3d at 632; Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). Where a
7 treating physician's opinion is contradicted by an examining professional's opinion, the
8 Commissioner may resolve the conflict by relying on the examining physician's opinion if the
9 examining physician's opinion is supported by different, independent clinical findings. See
10 Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995); Orn, 495 F.3d at 632. Similarly, to
11 reject an uncontradicted opinion of an examining physician, an ALJ must provide clear and
12 convincing reasons. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If an
13 examining physician's opinion is contradicted by another physician's opinion, an ALJ must
14 provide specific and legitimate reasons to reject it. Id. However, "[t]he opinion of a
15 non-examining physician cannot by itself constitute substantial evidence that justifies the
16 rejection of the opinion of either an examining physician or a treating physician"; such an
17 opinion may serve as substantial evidence only when it is consistent with and supported by
18 other independent evidence in the record. Lester, 81 F.3d at 830-31; Morgan, 169 F.3d at
19 600.

20 Once again, in assessing Dr. Diaz's opinion, the ALJ fails to appreciate the state of
21 medical knowledge about fibromyalgia. As already observed, there is no way to confirm
22 absolutely a diagnosis of fibromyalgia; the disease is diagnosed entirely on the basis of
23 patient reports. Benecke, 379 F.3d at 589-90. Thus, the ALJ's rejection of Dr. Diaz's
24 opinion, because it was based on Wilson's reported symptoms, was improper. So was the
25 ALJ's rejection of Dr. Diaz's opinion, because there were no objective examination findings.
26 Again, there is no objective laboratory testing that can establish fibromyalgia. The ALJ erred
27 by effectively requiring objective evidence for a disease that "eludes such measurement."
28

1 Benecke, 379 F.3d at 594. The Court already has rejected the ALJ's reliance on Plaintiff's
2 unexplained comment that she plays with her children.

3 The ALJ obviously relied primarily on Dr. Young's opinion that Plaintiff can perform
4 medium work. Yet Dr. Young's opinion actually confirmed Dr. Diaz's opinion to some extent.
5 Dr. Young diagnosed Plaintiff with myofascial neck sprain and possible fibromyalgia. He
6 found evidence of tender points but did not complete a full fibromyalgia examination. Nor
7 was a myelogram done. Dr. Young only saw Plaintiff once in 2007. Dr. Diaz found severe
8 fibromyalgia symptoms over a two year period from 2007 to 2009. Dr. Young's opinion is not
9 sufficient to offset Dr. Diaz's opinion or the lay witness testimony of Plaintiff's husband who
10 noted Plaintiff had gotten worse. (AR 52.) As already observed, the ALJ failed to develop
11 the record properly. The proper way to resolve the severity of Plaintiff's fibromyalgia is by
12 retaining a rheumatologist as a consulting examiner, conduct a full fibromyalgia examination
13 and have a myelogram done.

14 The ALJ did not have specific, legitimate reasons for rejecting Dr. Diaz's opinion.²

15 **V. THE ALJ IMPROPERLY DISREGARDED LAY WITNESS TESTIMONY**

16 Plaintiff's husband provided important testimony that he had to quit his job to take
17 care of the children because Ms. Wilson no longer could do so. Plaintiff's husband, Jose
18 Uribe, indicated that medication interferes with Claimant's ability to care for the children and
19 "spends most of the day in bed, with one good day a week." (AR 16.) Uribe's testimony is
20 consistent with Dr. Diaz' letter noting Wilson's chronic fatigue. (AR 179.) The ALJ decision
21 describes Uribe's testimony but never sets forth any reasons or evidence that would justify
22 disregarding it. This was error that was not harmless.

23 Lay witness testimony regarding a claimant's symptoms "is competent evidence that
24 an ALJ must take into account," unless the ALJ "expressly determines to disregard such

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26 ² The ALJ criticizes Dr. Diaz's reference to failed surgery in view of Plaintiff's
27 testimony she has not had surgery. (AR 16.) The only "failed surgery" was that surgery
28 was not an option for her carpal tunnel condition. (AR 43, 238.) The confusion over this
point hardly is a basis for rejecting Dr. Diaz's opinion, especially in as much that the
reference to surgery was not in regard to Plaintiff's fibromyalgia.

1 testimony and gives reasons germane to each witness for doing so.” Lewis v. Apfel, 236
2 F.3d 503, 511 (9th Cir. 2001); Smolen, 80 F.3d at 1288-89 (to reject lay witness testimony,
3 ALJ must make findings “germane to each witness, and supported by substantial evidence”).
4 The reasons germane to each witness must be specific. Bruce v. Astrue, 557 F.3d 1113,
5 1115 (9th Cir. 2009). Lay witness testimony cannot be disregarded without comment. Stout
6 v. Comm’r, 454 F.3d 1050, 1053 (9th Cir. 2006). In rejecting lay witness testimony, the ALJ
7 need not cite the specific record as long as “arguably germane reasons” for dismissing the
8 testimony are noted, even though the ALJ does “not clearly link his determination to those
9 reasons,” and substantial evidence supports the ALJ’s decision. Lewis, 236 F.3d at 512.
10 The ALJ also may “draw inferences logically flowing from the evidence.” Sample v.
11 Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). The failure to address lay witness evidence is
12 not harmless unless the Court can conclude confidently that no reasonable ALJ, on crediting
13 the testimony, would reach a different disability determination. Stout, 454 F.3d at 1054-56.

14 The Commissioner argues that his reason for rejecting Plaintiff’s credibility, i.e.,
15 Plaintiff plays with her children, applies equally to Uribe’s testimony and thus any error in not
16 commenting on Uribe’s testimony was harmless. The Court, however, already ruled that the
17 ALJ’s reliance on Plaintiff’s statement that she plays with her children was improper. Nor
18 can the statement be a basis for disregarding Uribe’s testimony.

19 Also of significance is Uribe’s statement that Plaintiff’s inability to care for her children
20 is due to her medications. An ALJ should consider all facts that might have a significant
21 impact on an individual’s ability to work, including side effects of medications. SSR 96-7p;
22 Erickson v. Shalala, 9 F.3d 813, 817-18 (9th Cir. 1993) (citing Varney v. Secretary of HHS,
23 846 F.2d 581, 585 (9th Cir. 1987) (superseded by statute on other grounds, see Bunnell v.
24 Sullivan, 912 F.2d 1149, 1153-54 (9th Cir. 1990)). Under Varney, an ALJ may not reject a
25 claimant’s testimony about the subjective limitations of medication side effects without
26 making specific findings similar to those required for excess pain testimony. Varney, 846
27 F.2d at 585. Varney is a case in which the claimant testified that her medications caused
28 fairly severe side effects. Id.

1 The ALJ erred in failing to comment on Uribe's testimony attributing her inability to
2 care for her children to medication side effects. The error is not harmless because, if
3 credited as to Wilson's need to lay down, she would not be able to work according to the VE.
4 (AR 57.) The ALJ also erred in not developing the record as to the impact of Plaintiff's
5 medications on her ability to work.

6 **VI. THE ALJ FAILED TO CONSIDER PLAINTIFF'S MULTIPLE**
7 **IMPAIRMENTS IN COMBINATION WITH EACH OTHER**

8 The ALJ opinion here never considers Plaintiff's multiple impairments and multiple
9 medications in combination. This was error. A claimant's illness "must be considered in
10 combination and must not be fragmentized in evaluating their effects." Beecher v. Heckler,
11 756 F.2d 693, 694-95 (9th Cir. 1985). The ALJ must consider the combined effect of all of a
12 claimant's impairments on his or her ability to function "without regard to whether each alone
13 was sufficiently severe." Smolen, 80 F.3d at 1290.

14 In addition to fibromyalgia, the ALJ found that Plaintiff also suffered from the severe
15 impairments of major depressive disorder, panic disorder and a history of myocarditis. (AR
16 12.) Additionally, Plaintiff is taking multiple medications for multiple medical impairments.
17 The ALJ erred by failing to consider Plaintiff's multiple impairments and multiple medications
18 in combination with each other.

19 The ALJ also summarily dismisses the evaluation of the consulting psychologist
20 examiner Dr. Wendel because her opinion is based on pain, which is outside her expertise.
21 (AR 16.) Yet Dr. Wendel certainly was qualified to assess Plaintiff's mental and emotional
22 state, and opined, "She likely would evidence repeated episodes of emotional episodes of
23 emotional deterioration in work-like situations." (AR 261.) The ALJ never addressed this
24 opinion, singly or in combination with Plaintiff's fibromyalgia.

25 * * * *

26 The ALJ's errors undermine the RFC and the step five determination that Plaintiff can
27 perform other work in the national economy. Thus, there is no need to address these issues
28 at this stage. On remand, after further developing the record on Plaintiff's fibromyalgia, the

1 ALJ should reassess Plaintiff's RFC and then begin anew with step five of the sequential
2 process.

3 **ORDER**

4 IT IS HEREBY ORDERED that Judgment be entered reversing the decision of the
5 Commissioner of Social Security and remanding the case for further proceedings in
6 accordance with law and this Memorandum Opinion and Order.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8
9 DATED: May 12, 2011

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE